Filed 12/31/18 In re K.A. CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re K.A., a Person Coming Under the Juvenile Court Law.	C087026
SACRAMENTO COUNTY DEPARTMENT OF CHILD, FAMILY, AND ADULT SERVICES, Plaintiff and Respondent, v. E.A., Defendant and Appellant.	(Super. Ct. No. JD238545)

E.A. (father) appeals from the juvenile court's dispositional order denying him reunification services as to minor K.A. (Welf. & Inst. Code, §§ 355/358.)[1] Father, who is incarcerated, contends the court failed to consider the required statutory factors under

[1] Undesignated statutory references are to the Welfare and Institutions Code.

section 361.5, subdivision (e)(1) (hereafter "§ 361.5(e)(1)") before determining that providing him services would be detrimental to the minor, and that even if the court considered those factors, its ruling was an abuse of discretion. We affirm.

I. BACKGROUND

On October 25, 2017, Sacramento County Department of Child, Family and Adult Services (the department) filed a section 300 petition as to the infant K.A., alleging that at her birth, she and mother tested positive for controlled substances, and both parents had untreated substance abuse problems which put the minor at risk.[2] The petition was later amended to, among other things, incorporate allegations about father's criminal history up to the time of the jurisdiction/disposition hearing.

According to the detention report, the minor remained in the hospital for nearly a month due to drug withdrawal symptoms. Mother said she and father were homeless and staying in motels. She admitted her ongoing drug problem and said father was an active heroin user.[3] The minor would be released to the care of maternal cousin E.O. and her live-in fiancé. Mother and father had not come in for scheduled drug testing.

At the detention hearing on October 31, 2017, the juvenile court found that father was the minor's presumed father after he executed a voluntary declaration of paternity. The court detained the minor.

The jurisdiction/disposition report, dated November 13, 2017, stated that the minor had been placed with the maternal cousin. The parents had continued to fail to drug-test or to appear for scheduled interviews and could not be reached by voice mail. As of October 30, 2017, the parents had not visited the minor since mother was

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[2] Mother is not a party to this appeal.

[3] Later she denied father's heroin use and said he used marijuana. However, at the jurisdiction/disposition hearing, father testified that "meth" and heroin, not marijuana, were the drugs he preferred.

discharged from the hospital at the start of the month. Due to a 2016 conviction for possession of a controlled substance while armed, father was on probation until 2021, but was not assigned to a probation officer. Reunification services were recommended for both parents.

The first addendum to the jurisdiction/disposition report, dated February 13, 2018, stated that father had been incarcerated on drug charges in Placer County jail, but as of January 18, 2018, had been at Deuel Vocational Institute (DVI), with a scheduled release date in July 2019. Services available at DVI did not appear to include any that would be helpful to reunification. Under section 361.5(e)(1), providing reunification services to father would be detrimental to the minor because (1) father's bond with the child, whom he had never visited, was minimal; (2) father's period of incarceration would exceed the six-month time limit for reunification with a minor under age three; (3) traveling to visit father at DVI would be detrimental to a child of the minor's age; (4) services available at DVI were unlikely to treat the issues which had required the juvenile court's intervention; and (5) father was unlikely to participate in services for substance abuse, given his lack of involvement in this case to date.

The second addendum to the jurisdiction/disposition report, dated March 27, 2018, stated that father was incarcerated for possession of narcotics for sale, evading a police officer, and reckless driving. Father probably could not obtain services at DVI because he was waiting for his main housing assignment. After his probable transfer to another prison in 90 days, he could participate in whatever services were available there.

The third addendum to the jurisdiction/disposition report, dated March 29, 2018, stated that father was sentenced to two years in prison after being found with 28 grams of heroin and 67 grams of methamphetamine on him; mother was his codefendant. According to the Placer County District Attorney, with credit for time served, July 2019 would be defendant's release date.

At the jurisdiction/disposition hearing on April 12, 2018, father testified as follows:

He was sentenced on January 11, 2018, to a term of three years four months. Although his projected release date with "half time" was July 7, 2019, he believed he was eligible for "third-time" credits under Penal Code section 2933 and Proposition 57, which would move his release date up to December 2018 or early January 2019. He acknowledged he was not certain to get those credits.

He had tried to get into all services offered at DVI. While waiting to "mainline," he had enrolled in Narcotics Anonymous (NA), Alcoholics Anonymous (AA), and Celebrate Recovery. He was attending church once a week. He was also "starting to get" his GED because it would help him to get work and stabilize his situation in the future. His father and sister had promised that he could stay with one of them upon release.

When asked what his plans for the minor were, father responded: "Really, I'm just trying to make myself a better person so when I get out, I could actually have a better opportunity in raising her and just changing my life and . . . not . . . doing all the stuff I was doing." He could not do anything to help anyone else before he helped himself.

Father had not yet attended NA and AA because he had been put on a waiting list. He had not yet participated in Celebrate Recovery, stating: "I was supposed to participate Wednesday, but you guys picked me up Monday." He really wanted substance abuse treatment, for himself and for his daughter. Father wanted nothing more than to be with his daughter. He was willing to drug-test and participate in any required services.

Father got out of custody in late July 2017 in Sacramento County, then got picked up by Placer County; he bailed out so he could be out of custody on September 29, 2017, when the minor was born. He went back into custody on November 14, 2017, after being picked up on a warrant and a fresh charge (sale of methamphetamine and heroin, a

similar charge to his 2016 offense). Before going in, father saw the minor for a couple of days, then again when the authorities "dropped off" mother; "[t]hat was about it."

Father believed the authorities would allow visits with the minor wherever he wound up; he did not know what that would be like for the minor. Since father did not know where he would wind up, he did not know what services would be available there.

Father's drug of choice was methamphetamine, which he last used a couple of days before his latest arrest; he also had a "little bit" of a problem with heroin, but not with marijuana. He admitted he had never drug-tested for this case and would have tested positive on the scheduled date. He also admitted he had failed to show up for interviews with social workers.

Under questioning by the juvenile court, father denied that this case was not important to him when he was out of custody, but admitted that at that time he was "just high, not listening." He did not see things clearly because he was more worried about his drug addiction.

Asked how he could get an early release date, father stated that getting "third-time" would take six months off, putting his release date up to early January 2019; he could also get three months' credit for completing his GED and "a week for every 52 hours accumulated of self-help." He agreed that this scenario would be "dependent on [him] doing a lot of different things" and if he failed to do them or did other things he would not get out before July 2019.

Father claimed he missed his scheduled drug test because he had already tested in Placer County for his criminal case that day, and by the time he got out it was early afternoon. He admitted, however, that he had had the opportunity to come in and do the test.[4]

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[4] Father also admitted he had missed two scheduled drug tests, not just the one on that day.

After hearing argument, the juvenile court ruled as follows (italics added):

"As relates to disposition, sir, I'll let you know I do appreciate your candor. It's the Court's opinion that you answered all the questions truthfully. *My issue with giving you services is your conduct prior to going into custody*. Based on the evidence presented today and also my review of the reports, you missed several drug tests you were supposed to take with the county. You missed several interviews you were supposed to have with social workers. You had the opportunity to visit with the child several times between her birth on September 29th and you going into custody on November 14th of 2017, and you did not take advantage of those opportunities. You continued to sell drugs after her birth. And the reason you are in this position of not knowing whether you'll be able to take certain classes that will satisfy the Court is through your own actions. You've been in DVI for some time, and you have signed up for classes, but you have not participated in any classes. At this time your scheduled release date is not until July 2019, which will be approximately nine months after the scheduled 366.21(e) hearing.

"When considering . . . section 361.5(e), the Court considers the age of the child, the degree of the parent-child bond, and the length of the sentence and other factors concerning the detriment to the child. The Court believes the Department has shown by clear and convincing evidence that it would be detrimental to give services to the father because of the length of his sentence. *Also, giving services to the father could delay permanency to the child*. The Court does not have enough information to determine whether whatever prison he ends up going to, if it will have all the necessary services needed for the father to reunify because at this time the father is just in the DVI program.

"The father's conduct prior to going to custody does not give the Court confidence that the father will take advantage of services. The father sold drugs prior to the child being born and continued selling drugs after the child was born. The father also had minimal contact with the child for the month and a half he was out of custody.

". . . The extent of progress made by the father at this time is absent . . . .

". . . Reunification services shall not be provided to the father, pursuant to the Court's ruling as it relates to 361.5(e)(1). . . .

"Sir, just so we're clear, like I said, I do believe that you were being sincere with your statements. And just because right now you are not getting services, I encourage you to take as many courses [as] you can to improve your life and take whatever courses you can to decrease your sentence. If you are able to accomplish what you are hoping you can accomplish, you can ask your attorney to file what we call a 388, which, basically, means there is a change of circumstances; and the Court will then consider that. The issue that we have is that all the things that you want to accomplish are hopes and dreams and goals. They are not things that are guaranteed. They are all things that are dependent on actions that you have to do regarding getting your GED will decrease your sentence, regarding doing these classes that you haven't done yet, regarding taking certain classes that reduce your sentence by a week or so. Those are not things that are guaranteed. The only thing that is guaranteed is you are not getting out until July 2019. If all the things that you are hoping to accomplish you actually do, your attorney can file a 388 and say, 'My client is actually going to be getting out in September.' Then the Court will consider that.

"The reason I'm telling you that is because right now you are not getting services. If you are able to accomplish all those things, your attorney can request that. It does not necessarily mean . . . I will grant that 388. But I just didn't want to discourage you and tell you right now all is lost, because there is that possibility. But you are the one that has to do that because, I'm sure you know from my position, a lot of people testify or come in

here and say, 'Oh, yeah I'm going to do this, and if I do that, this will happen.' But when it comes down to it, they don't do any of that."[5]

II. DISCUSSION

Section 361.5(e)(1) provides as relevant:

"If the parent or guardian [of a dependent child] is incarcerated . . . , the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime . . . , the degree of detriment to the child if services are not offered . . . , the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations described in subdivision (a),[6] and any other appropriate factors."

"Section 361.5[](e)(1) does not require that each listed factor exist in any particular case, nor does it specify how much weight is to be given to a factor bearing on detriment, listed or not." (*Edgar O. v. Superior Court* (2000) 84 Cal.App.4th 13, 18 (*Edgar O.*).)[7]

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[5] The juvenile court denied visitation to father while incarcerated, but allowed for contact by cards and letters.

[6] Section 361.5, subdivision (a)(1)(B), provides that if a child is under three years of age when initially removed from the parent's physical custody, services shall be provided for six months from the dispositional hearing.

[7] Father cites *In re Dylan T.* (1998) 65 Cal.App.4th 765, 774 for its holding that "[t]he court must consider each listed factor and any other additional factors when it determines detriment. Any one factor or combination of factors might result in a finding of detriment, but it must be shown by clear and convincing evidence how the factor or factors result in a detriment." *Dylan T.* deals with visitation for an incarcerated parent, not with reunification services per se. (*Id.* at pp. 770-775.) The court found that the juvenile court erred by denying visitation based only on the minor's age (a factor listed in section 361.5(e)(1)) without supporting evidence to show that that fact would make

" '[T]here are many cases in which the provision of . . . services has little or no likelihood of success and thus only serves to delay stability for the child . . . . This is especially true when the parent will be incarcerated longer than the maximum time periods for reunification efforts. It is also frequently true when the parent is incarcerated in a facility that has no services sufficient to help the parent work toward reunification and there is no reasonable way to provide services to that parent. Indeed, to attempt services in such circumstances may be setting everyone up for failure, including the parent, agency, and child. Thus, in cases such as these, it may be possible to show that providing services to the incarcerated parent would be detrimental to the child since it would delay permanency with no likelihood of success.' " (*Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1030-1031 (*Fabian L.*), quoting Seiser and Kumli, Cal. Juvenile Courts Practice and Procedure (2012) § 2.129[2][b], pp. 2-390 to 2-391, italics omitted.)

We review an order denying reunification services under the substantial evidence standard. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914 (*R.T.*).)

According to father, the juvenile court's statement that "[m]y issue with giving you services is your conduct prior to going into custody" shows the court abused its discretion by deciding the issue on grounds unrelated to detriment to the minor, and the court's later discussion of the section 361.5(e)(1) factors amounted to window dressing. We disagree.

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visitation detrimental to the minor. (*Dylan T.*, *supra*, at pp. 773-774.) As we explain, the juvenile court here did not err in that way. Thus, *Dylan T.* is not on point.

So far as father contends the juvenile court erred by not spelling out on the record how it had weighed every listed factor, neither *Dylan T.* nor any other authority cited by father holds that the juvenile court must do so expressly, and it would be pointless for the court to discuss factors that did not exist in the case before it. (*Edgar O.*, *supra*, 84 Cal.App.4th at p. 18.)

The juvenile court could properly consider father's precustody conduct in assessing whether offering him reunification services would be detrimental to the minor. Section 361.5(e)(1) directs the court to examine not only the specifically enumerated factors, but also "any other appropriate factors." Where a parent's substance abuse problem is the cause of the minor's removal from his custody, he cannot hope to reunify with the minor unless he can overcome the problem. To offer reunification services to a parent who cannot or will not overcome the problem that required the court's intervention, or whose chances of doing so within the allowable time limit for reunification are poor, is detrimental to the minor because it delays permanency—especially where the minor is an infant in need of attaining permanency as soon as possible. (See *Fabian L., supra*, 214 Cal.App.4th at pp. 1030-1031.) It is certainly appropriate for the court to consider the parent's history of dealing with the problem that led to removal of the minor from the parent's custody. Here, as the court found, that history gave little ground for optimism.

It appears that before father landed in DVI, he showed no interest in dealing with his drug problem. When the minor was born addicted to drugs due to mother's drug use during pregnancy, father not only did not change his longstanding course of polysubstance abuse, but committed a new felony drug offense (with mother as codefendant) less than two months after the minor's birth. During those months, he almost never saw the minor. After this case was opened he failed to drug test or to show up for interviews with social workers because he was "just high, not listening." He did not take a single step to cooperate with the department. Undertaking to solve his drug problem was the sine qua non for any hope of reunification, but nothing about father's precustody conduct suggested he would be able or willing to tackle the problem. Thus, that conduct pointed toward the conclusion that offering him reunification services would be detrimental to the minor by delaying permanency for her. (*Fabian L., supra*, 214 Cal.App.4th at pp. 1030-1031.)

It is true that once father entered DVI, he claimed to have become eager to deal with his problems and to have enrolled in services that would help him do so, as well as making other efforts (such as obtaining his GED) that might improve his prospects of becoming a responsible parent. But he had not yet participated in any of those services. And since it was unknown whether they would be available in the prison to which he would be reassigned, it was also unknown when or whether he would be able to participate in such services after he left DVI. (See *Fabian L., supra*, 214 Cal.App.4th at pp. 1030-1031 [facility that fails to offer adequate services].)

In addition to father's precustody conduct, the juvenile court also expressly considered the applicable enumerated factors in section 361.5(e)(1): "the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime . . . , and the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations." As the court found, these factors all worked against granting services to father. The child's young age made it essential to achieve permanency for her as early as possible. The "degree of parent-child bonding" was near zero, since father had barely seen the child up until now even when he had the opportunity. The "length and nature of the treatment" was impossible to assess, since no one knew what treatment would be available to father in the future. The "nature of the crime" was an outgrowth of the very problem that had required the child's removal from the parents' custody. And father was unlikely to be discharged from incarceration within six months, even if he did everything he optimistically promised he would do. Far from being an afterthought tacked onto a predetermined conclusion, the court's discussion of these factors related directly to its assessment of father's precustody conduct. Finally, the court expressly cited the underlying ground for detriment: Granting services to father could delay permanency for the minor.

Father's claim that the juvenile court abused its discretion rests on the premise that the court applied the wrong standard and disregarded the issue of detriment to the minor.

He relies mainly on *In re Kevin N.* (2007) 148 Cal.App.4th 1339. His reliance is misplaced. In *Kevin N.*, the juvenile court erred in two ways: by misreading section 361.5, subdivision (a)(3), to limit reunification services to six months for all the minors even though only one was under age three, and by finding that providing services to a parent would be futile without finding that it would be detrimental to the minors. (*Kevin N.*, at pp. 1342-1345.) Here, the court did not misread any statute, and made the express finding missing in *Kevin N.* That decision does not assist father.

Because father's premise in support of his claim of abuse of discretion is mistaken, we consider only whether substantial evidence supports the order made by the court. (*R.T., supra*, 202 Cal.App.4th at p. 914.) For the reasons already given, we conclude that it does.

III. DISPOSITION

The order appealed from is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.